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No. 86-1339

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MICHAEL O'LEARY, Warden,

Petitioner,

-vs-

GEORGE DUNCAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
1100 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	3
WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING	3
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Cases

Cuyler v. Sullivan, 446 U.S. 335, 10 S.Ct. 1708, 64 L.Ed. 2d 333 (1980) 4

Fay v. Noia, 9 L.Ed. 2d 868 5

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 6

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). 6

People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 67 (1977). . 6

People v. Duncan, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981). 3-4

People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977) . 6

People v. Washington, 101 Ill. 2d 104, 461 N.E.2d 393 (1984) 6

Price v. Johnston, 334 U.S. 266, 92 L.Ed. 1356, 68 S.Ct. 1049 5

Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983) 5

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963) 5

United States ex rel. Duncan v. O'Leary, 806 F.2d, 1307 (7th Cir. 1986). 4-5,7

Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986). 7,8

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). 5,6,7

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported as United States ex rel. Duncan v. O'Leary, 806 F.2d 1307 (7th Cir. 1986).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment (VI)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment (XIV)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Amplification and clarification of petitioner's factual statement have been incorporated within the argument.

REASON FOR DENYING THE WRIT

WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING.

Petitioner seeks review in this Court claiming, as it has done below, that respondent has procedurally defaulted on his conflict of interest claim since he did not fairly present this claim to the state courts and, as a result, failed to exhaust his state court remedies. Petitioner no longer argues against the fact that the evidence developed at the federal evidentiary hearing clearly established active collusion between defense attorney LaSaine and Assistant State's Attorney Gibson. Nor does petitioner argue, as it did below, that the respondent knowingly and intelligently waived any resulting conflict. The sole remaining issue urged by petitioner is a purported procedural default.

Respondent was originally tried and found guilty in state court for the murder of his girlfriend. In post-trial proceedings, Duncan's original trial counsel withdrew and new counsel was appointed. The basis of the motion for a new trial was ineffective assistance of counsel due to a conflict of interest. That conflict was bottomed on the fact that contemporaneous with his representation of Duncan defense counsel LaSaine was also acting as campaign manager for Assistant State's Attorney Joseph Gibson who was running for State's Attorney and also happened to be the prosecutor in the Duncan case. Following a hearing, the trial court found that a potential conflict of interest existed but that respondent had effectively waived the issue. The court then went on to sentence George Duncan to a forty-year term of imprisonment.

On appeal to the Illinois Appellate Court, it was determined that respondent's waiver of the conflict issue was made "knowingly and intentionally". People v. Duncan, 97 Ill. App. 3d 896,

899, 424 N.E.2d 67 (3d Dist. 1981). A later State post-conviction petition raising the same issue also failed. In all of the state court proceedings, respondent relied on pre-Cuyler law in arguing that original defense counsel, LaSaine, labored under a conflict of interest which constituted ineffective assistance of counsel per se. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980).

Respondent then filed a federal habeas corpus petition where he once again raised the conflict of interest issue. The district court subsequently ordered an evidentiary hearing to determine whether the claim was waived and whether the Cuyler standard was met (i.e., whether petitioner's trial counsel represented conflicting interests so that an actual conflict of interest adversely affected counsel's performance).

Prior to the commencement of the federal evidentiary hearing, respondent successfully expanded the record pursuant to Rule 7, Rules Governing §2254 Cases in the United States District Courts, with affidavits from numerous state witnesses. These witnesses included police officers, experts, and other material witnesses who stated that they were never contacted by defense counsel LaSaine prior to trial. LaSaine had begun his representation of Duncan on the charge of murder less than two weeks prior to trial and failed to ever seek a continuance.

For the most part, the evidence adduced at the evidentiary hearing paralleled and expanded upon the evidence developed during the state proceedings. The most notable exception, and the cause of petitioner's concern before this Court, was the testimony of Patricia Brandt who served as LaSaine's secretary from December 1979 through April 1981. Ms. Brandt's testimony clearly established, beyond doubt, active collusion between defense attorney LaSaine and Assistant State's Attorney Gibson (see Appendix of Petitioner's petition, pages 7, 24-25, henceforth, App. 7). In issuing its writ the district court unquestionably so concluded and further found there to be no waiver. The Seventh Circuit Court of Appeals later unanimously affirmed the district court's holding [United States ex rel. Duncan v.

O'Leary, 806 F.2d, 1307 (7th Cir. 1986) and declined petitioner's petition for rehearing and suggestion for rehearing en banc (App. 16).

Petitioner's principal allegation, relying on this Court's opinion in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977), appears to be that respondent has procedurally defaulted on his claim of conflict of interest since the state court was not provided a complete opportunity to review and decide the constitutional claim of error. Specifically, the petitioner claims such default since respondent, in state court, urged that there was a per se conflict of interest as opposed to an actual conflict that adversely affected LaSaine's performance. Petitioner particularly objects, as earlier noted, to the introduction, during the federal evidentiary hearing, of the testimony of Patricia Brandt, whose testimony clearly established active collusion on the part of attorneys Gibson and LaSaine.

It is initially important to note that Wainwright v. Sykes did not alter this Court's Townsend standard in the context of whether an evidentiary hearing should be held. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963). See Spencer v. Zant, 715 F.2d 1562, 1579 (11th Cir. 1983). In Townsend, this court held in part:

> If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, 9 L.Ed. 2d 868, (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. ... Compare Price v. Johnston, 334 U.S. 266, 291, 92 L.Ed. 1356, 1372, 68 S.Ct. 1049: "The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." 9 L.Ed. 2d at 788.
>
> . . .
>
> The ... power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew. 9 L.Ed. 2d at 785.

The district court here properly conducted such a plenary hearing and the facts developed at that hearing are no longer in controversy.

Furthermore, in relying on Wainwright v. Sykes, the petitioner fails to take into account the status of Illinois and federal law regarding conflicts of interest in 1980 when this case arose. Under Illinois law, which recognizes per se conflicts of interest, a defendant does not necessarily have to allege and prove prejudice to gain relief when his attorney labors under a conflict.[1] People v. Washington, 101 Ill. 2d 104, 461 N.E.2d 393, 396 (1984). Such state court decisions as People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 67 (1977) and People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977) had clearly established Illinois law prior to when this case arose. Further, the decision of this Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978), reinforced the Illinois law. The Illinois Supreme Court recognized that when a conflict of interest comes to the attention of a trial court and the court fails to appoint independent counsel or adequately inquire into the conflict, reversible error automatically occurs. Prejudice is presumed and need not be shown, since the effects of a conflict are invidious and difficult to calculate. Thus, the fact that the petitioner did not sooner develop how the conflict of interest adversely affected counsel's performance properly did not preclude habeas corpus relief. As the habeas court recognized, the respondent took the necessary steps to pursue the conflict of interest issue under the law in effect at the time.

As the Seventh Circuit itself subsequently concluded:

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[1]The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

> In the instant case, petitioner raised essentially the same claim in both state and federal courts.[2] At all times he has maintained that LaSaine labored under a conflict of interest stemming from his role as Gibson's campaign manager that violated petitioner's Sixth Amendment rights. The per se standard (which presumes prejudice) and the Cuyler standard (which creates only a limited presumption of prejudice) are simply two different legal standards that in this case are being applied to the same claim -- that LaSaine's political relationship with Gibson resulted in a conflict of interest which violated petitioner's Sixth Amendment rights. The arguments made by petitioner differed only because the two jurisdictions (Illinois and the Seventh Circuit) have different legal standards for conflict of interest claims, and petitioner has tailored his arguments in state and federal court to reflect this difference.
>
> Petitioner should not be penalized by the fact that the Illinois Supreme Court and this Court differ on the proper legal standard to use to adjudicate a conflict of interest claim.... Respondent would have petitioner argue in Illinois state court that the higher Cuyler standard should apply to his conflict of interest claim, which would put petitioner in the anomalous position of urging the Illinois courts to adopt a standard for adjudicating a conflict of interest claim that is less favorable to petitioner than Illinois' current view of the appropriate legal standard. (App. 11)[3]

That Court went on to conclude that even if Duncan's conduct could somehow be construed as constituting a procedural default the doctrine enunciated in Wainwright that such a default bars federal habeas relief nevertheless mandates that respondent's claim under the Cuyler standard be heard. The Seventh Circuit properly concluded that respondent provided the state courts adequate opportunity to correct any federal constitutional error before proceeding to the federal courts (App. 12).

Petitioner also suggests a factual as well as legal procedural default. Citing to this Court's recent opinion in Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986), petitioner claims that "... Vasquez expressly declined to address the circumstances present in this case, wherein a habeas

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[2]The precise issues raised in the Third Judicial District Appellate Court regarding the conflict were framed as follows: I. Did a conflict of interest exist due to the fact that counsel for defendant was also campaign manager for the prosecutor; II. Did defendant waive any conflict of interest?

[3]This case is now reported as United States ex rel. Duncan v. O'Leary, 806 F.2d 1307 (Seventh Cir. 1986).

applicant withheld 'essential facts from the state courts' and sought to later use those withheld facts in federal court as a basis for a specific allegation of constitutional error which was likewise never presented the state courts." (Pet. brief 21). However, the Vasquez Court went on to specifically hold:

> "...that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence".

___ U.S. ___, 88 L.Ed. 2d at 607.

In any event, there is simply no evidence, beyond petitioner's bald assertions, that any essential facts were withheld from the state courts. The Seventh Circuit, based on the record developed in the district court proceedings, properly found that Patricia Brandt's relevant testimony as to the active collusion between LaSaine and Gibson "...was discovered only just before the habeas evidentiary hearing conducted by the district court" (App. 13).

There was no procedural default here. The claim raised by respondent-Duncan regarding defense counsel's conflict of interest was properly raised in both state and federal court. That conflict, based on defense counsel LaSaine's active collusion with Assistant State's Attorney Gibson adversely affected his performance at respondent's trial for murder. LaSaine, although entering the case less than two weeks prior to trial, never sought a continuance; failed to interview witnesses; failed to provide effective cross-examination; and as noted by the district court, was very deferential to Gibson's "eloquence" during his opening and closing argument (App. 37). Respondent has clearly met the standard enunciated by this Court in Cuyler. No compelling need exists for this Court to grant certiorari review.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
1100 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR RESPONDENT